and only in flagrant cases, therefore, will an act so attested be impeached. That the judges should deprive themselves of the power to administer relief against the fraud of a clerk or a printer's blunder would be, it is submitted, a public misfortune. The best doctrine seems to be that by which the judiciary reserves to itself a wise discretion. As it is expressed in *Gardner* v. *The Collector*, "Whenever a question arises as to the existence of a statute, or as to the time when it took effect, or as to its precise terms, the judges who are called upon to decide such question have a right to resort to any source of information which, in its nature, is capable of conveying to the judicial mind a clear and satisfactory answer to such question; the best and most satisfactory evidence in all cases being required."

RICHARD S. HUNTER.

Supreme Court of Missouri.

HAMILTON *v.* MARKS ET AL.

Fraud or illegality in the inception of a negotiable promissory note transferred before maturity, will vitiate the same in the hands of a person having knowledge of the fraud or illegality; and when such fraud or illegality is established, the burden of proof is devolved upon the holder, to show that he took the note in good faith or for value.

But when such note is taken in good faith and for value, the holder is vested with a good title, notwithstanding there may have been circumstances connected with the transfer to him sufficient to put an ordinarily prudent man on inquiry.

PLAINTIFF brought his action upon a negotiable promissory note executed by the defendants to one T. H. Cooley, and by Cooley assigned to plaintiff before maturity. The answer of the defendant set up a conditional sale of a farm to him by Cooley; that the conveyance was made to him for the purpose of making the sale to one Walker, and that the note was executed to secure Cooley in the faithful discharge by Marks of the trust; and that, in case no sale should be made to Walker before the note became due, the same was to be void.

The answer also set up a fraudulent conspiracy between Walker and Cooley to sell the farm to him, and charged the plaintiff with notice of the fraud. It was also averred that no value was given in consideration of the assignment, &c. There was a replication filed by the plaintiff, denying all the material allegations in the answer, and upon the issues thus formed the trial was had. Both parties gave evidence tending to establish their respective sides of the case. There was a verdict for the defendants, upon which judgment was rendered and the plaintiff appealed.

The opinion of the court was delivered by

WAGNER, J.—In order to understand and determine upon what theory the case was tried, it will be necessary briefly to recur to the material instructions given by the court. The nine propositions given on the request of the plaintiff, and the two first for the defendants, cannot be subject to any contest, as they merely assert what has long been established as the law in reference to the rights and liabilities of parties to negotiable paper. But the remaining instructions given for the defendants constitute the principal contention in the case, and are the ones to which plaintiff strenuously objects. By the third instruction the jury are told that if they believe from the evidence that the note in suit was obtained by Cooley, the payee therein, by fraud practised by him upon the defendant, Marks, or if the circumstances appearing in proof tend to show that the transfer of the note by Cooley to Hamilton was made by Cooley and accepted by Hamilton for the purpose of thereby gaining an advantage over defendants, then the burden of proof rests upon the plaintiff in the case to show before he can recover that he purchased said note of Cooley in good faith without notice or knowledge of such fraud before the maturity of the note and paid a valuable consideration therefor. The fourth instruction declares that if the jury believe from the evidence that the note sued on was obtained by Cooley from the defendant Marks by fraud or fraudulent means used by Cooley, then in order to affect the plaintiff by notice of such fraud and render the note invalid in his hands, it is not necessary that he should have actual and positive knowledge of such fraud before the assignment of said note to him, but that it is sufficient notice if it be such as ordinarily prudent men usually act upon in the common affairs of life. The fifth instruction says that if from all the facts and circumstances given in evidence, the jury believe that the note in suit was procured from Marks by fraud, and they further believe that the plaintiff Hamilton, before or at the time of the actual assignment, transfer and delivery of the note to him, and the actual payment of a valuable consideration therefor knew of the existence of such fraud in the procurement of the note, or was then conscious of having the means of knowing and failed to use them, or failed or declined to use that ordinary care and diligence which a prudent man usually acts upon in the ordinary affairs of life, then the plaintiff is not a purchaser of said note in good faith, without notice, and the jury

should find for the defendants, although they may believe that plaintiff, Hamilton, paid Cooley a valuation consideration for the note. The sixth instruction asserts essentially the same proposition as embodied in the above, framed in different language.

The main questions of inquiry arising on the record, according to the foregoing instructions, are, first, whether circumstances of suspicion sufficient to put a prudent man on inquiry, constitute notice in regard to negotiable paper, and whether negligence or want of care in the investigation of such circumstances can be imputed as notice, and further upon whom is the burden of proof when it is charged and proved that the note was founded in fraud so as to destroy its validity between the original parties, when it is in the hands of an assignee, having been transferred before due.

This case was previously in this court on appeal from the Linn County Court of Common Pleas (52 Mo. 78), and the doctrine then announced was that, in order to let in equitable defences against a note assigned before maturity, that express notice of the consideration before the assignment was made was not indispensable; but that it would be sufficient if the circumstances were of such a character as necessarily to cast a shade upon the transaction and to put the holder upon inquiry. The instructions upon this point followed the rule laid down above, and the plaintiff's counsel now zealously insists that the principle declared is erroneous, and asks that it should be re-examined. As a general proposition we should be unwilling to accede to the request. It is fit and proper that there should be an end to litigation, and when a rule has been adjudged upon mature deliberation, and after solemn argument, it ought to be considered as finally determined. When a case has once been in the Appellate Court and is sent back, if it is retried in conformity with the principle announced in the higher tribunal and is again taken up, cogent and convincing reasons must exist to induce a re-examination of what ought to be considered as *res judicata*. But, in view of the fact that subsequent decisions of this court, though not noticing or professing to overrule the decision in this case, are, in my opinion, inconsistent with it, and, considering the great importance of having some settled and stable rule in reference to a question which so vitally concerns the business transactions of the whole community, it is deemed advisable to depart from the usual practice and consider the question again. When the case was here before, the judge who wrote the opinion

placed his chief reliance upon the authority of *Pringle* v. *Phillips*, 5 Sandf. 157, and the cases therein cited and reviewed by Judge DUER in his very elaborate and able opinion. The case of *Pringle* v. *Phillips* was decided in the Superior Court of New York city, and has been expressly disapproved and repudiated by the Court of Appeals in that state, as will be hereinafter shown. Its doctrine has never attained a foundation in that great commercial state. The case was an action of replevin in the *detinet* for the recovery of merchandise which had come into the possession of the defendant from a fraudulent vendee of the plaintiff, as security for advances made, but, as alleged by the plaintiff, with notice of the fraud, and the question now under consideration was not involved.

As England was the great commercial nation of the world, the leading principles of mercantile or commercial law have been derived from her courts. The general rule of common law was, that except by a sale in market overt, no one could give a better title to personal property than he himself had. But it was established at an early period that securities transferable by delivery were exempt from this principle. In *Lawson* v. *Weston*, 4 Esp. 56, Lord KENYON said: "If there was any fraud in the transaction, or if a *bonâ fide* consideration had not been paid for the bill by the plaintiffs, to be sure they could not recover; but to adopt the principle of the defence to the full extent stated, would be at once to paralyze the circulation of all the paper in the country and with it all its commerce. The circumstances of the bill having been lost might have been material, if they could bring knowledge of that fact home to the plaintiffs. The plaintiffs might, or might not, have seen the advertisement, and it would be going at great length to say that a banker was bound to make inquiry concerning every bill brought to him for discount. It would apply as well to a bill for 10*l.* as for 10,000*l.*" This doctrine of Lord KENYON was not new. The same principle had been previously announced by Lord HOLT in *Anon.*, 1 Salk. 126; by Lord MANSFIELD in *Miller* v. *Race*, 1 Burr. 452; in *Grant* v. *Vaughan*, 3 Id. 1516; and in *Peacock* v. *Rhodes*, 2 Doug. 633; and was considered the well-settled law.

But in the later case of *Gill* v. *Cubitt*, 3 B. & C. 466, decided in 1824, ABBOTT, Ch. J., upon the trial instructed the jury: "That there were two questions for their consideration; first,

whether the plaintiff had given value for the bill, of which there could be no doubt, and secondly, whether he took under circumstances which ought to have excited the suspicion of a prudent and careful man. If they thought he had taken the bill under such circumstances, then, notwithstanding he had given full value for it, they ought to find a verdict for the defendant."

The jury found for the defendant, and after a full argument before the whole court, the charge was approved, and judgment was entered upon the verdict. The rule established in *Gill* v. *Cubitt* created great dissatisfaction in mercantile and commercial circles, but it was adhered to for a period of twelve years, or as long as Chief Justice ABBOTT presided on the bench. He broke in upon the ancient rule and established the doctrine, but it died with his retirement.

In *Crook* v. *Jadis*, 6 B. & Ad. 909, the doctrine received a very material modification. The action was brought by the endorsee of the bill against the drawer. It was held that it was "no defence that the plaintiff took the bill under circumstances which ought to have excited the suspicions of a prudent man that it had not been fairly obtained. The defendant must show that the plaintiff was guilty of gross negligence."

This last case was affirmed in *Backhouse* v. *Harrison*, 5 B. & Ad. 1098, and one of the judges (PATTESON) earnestly assailed the case of *Gill* v. *Cubitt*. Finally, a step further was taken in *Goodman* v. *Harvey*, 4 Ad. & E. 870, and the rule in *Gill* v. *Cubitt* was utterly rejected and repudiated; Lord DENMAN, speaking for the whole Court of King's Bench, used the following language: "I believe we are all of opinion that gross negligence only would not be a sufficient answer where the party has given a consideration for the bill. Gross negligence may be evidence of *mala fides*, but it is not the same thing. We have shaken off the last remnant of the contrary doctrine. Where the bill has passed to the plaintiff without any proof of bad faith in him, there is no objection to his title." This last case was decided in 1836. It was reaffirmed in *Uther* v. *Rich*, 10 Ad. & E. 784, decided in 1839, and again in *Arbonin* v. *Anderson*, 1 Q. B. 498, 504, decided in 1841, and has ever since been the undisputed law of England.

The Supreme Court of the United States has adopted the rule announced in *Goodman* v. *Harvey*, to its fullest extent. The

question first came before the tribunal in *Swift* v. *Tyson*, 16 Pet. 1, and *Goodman* v. *Harvey*, and the class to which it belongs were followed. In the case of *Goodman* v. *Simonds*, 20 How. 443, Judge CLIFFORD, writing the opinion of the whole court, gave the subject, both upon the authorities and upon principle, the most elaborate and exhaustive examination that is anywhere to be found in the books. From that case the following propositions are deducible: 1. The possession of negotiable paper carries the title with it to the holder; 2. The party who takes it before due for a valuable consideration, without knowledge of any defect of title, and in good faith, holds it by a title valid against all the world; 3. Suspicion of defect of title, or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. That result can be produced only by bad faith on his part; 4. The burden of proof lies on the person who assails the right claimed by the party in possession. This case was followed by *The Bank of Pittsburgh* v. *Neal*, 22 How. 96, and again in *Murray* v. *Lardner*, 2 Wall. 110, the question was considered and the cases reviewed, and *Goodman* v. *Simonds* was affirmed by the whole court.

In New York the same principle is fully adopted: *Magee* v. *Badger*, 34 N. Y. 247. In the case of the *Belmont Branch Bank* v. *Hoge*, 35 N. Y. 65, Mr Justice PORTER, in giving the opinion of the court, says: "Upon the facts proved, it is manifest that the jury were right in finding that the defendants were *bonâ fide* holders of the paper in question." The instructions of the learned judge on this branch of the case were more favorable to the plaintiffs than the law would strictly justify. He gave them the benefit of the assumption that, though the defendants took the paper from the apparent owners for value, before it became due, and without notice of any defect in their title, the plaintiffs could reclaim their bills if they proved the existence of circumstances which would have been likely to excite the suspicions of a cautious and vigilant purchaser. We cannot accept this as an accurate exposition of the rule applicable to the transfer of commercial paper, though it is in accordance with antecedent decisions in the Superior Court: *Kentgen* v. *Parks*, 2 Sandf. 60; *Pringle* v. *Phillips*, 5 Id. 157; *Danforth* v. *Dart*, 4 Duer 101.

We had occasion to express our views on this question in the

case of *Magee* v. *Badger*, 34 N. Y. 247. "One who for full value obtains from the apparent owner a transfer of negotiable paper before it matures, and who has no notice of any equities between the original parties, or of any defect in the title of the presumptive owner, is to be deemed a *bonâ fide* holder. He does not owe to the party who puts such paper in circulation the duty of active inquiry to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by the mere speculation as to his probable diligence or negligence. The authority mainly relied on in the exceptional cases which have favored an opposite theory, is the decision in *Gill* v. *Cubitt*, 3 B. & C. 466. The doctrine of that case has been repeatedly overruled, as well in the English as in the American courts; and it cannot be recognised as authority without sanctioning an unwise innovation in our system of commercial law." The question was again discussed in *Seybel* v. *Nat. Cur. Bank*, 54 N. Y. 288, and the doctrine above announced was reiterated.

The same principle is established in Pennsylvania. In *Phelan* v. *Moss*, 67 Penn. St. 59, after an elaborate discussion, it was held that a purchaser before due and without notice of a negotiable promissory note, fraudulent as between the original parties, obtained a title thereto, although he took it under circumstances which ought to have excited the suspicions of a prudent man.

The case of *Lake* v. *Reed*, 29 Iowa 258, is to the same effect. See also *Raphael* v. *Bank of England*, 17 C. B. 161; *Worcester County Bank* v. *Dorchester Bank*, 10 Cush. 488; *Brush* v. *Scribner*, 11 Conn. 388; *Woolfolk* v. *Bank of America*, 10 Bush. 504.

In this state, in *Horton* v. *Bayne*, 52 Mo. 531, it was held that an endorser of negotiable paper before maturity was presumed to be the owner in good faith and for value, unless there were circumstances antecedent to, or attendant on, the act of transfer, amounting to either actual notice to the holder of fraud, illegality or failure of consideration, or such a combination of suspicious circumstances as would, in legal contemplation, afford ground for the presumption that the purchaser of the paper was aware at the time of its acquisition of some equity between the original parties which should have prevented its purchase. And in *Merrick* v. *Phillips*, 58 Mo. 436, it was decided that the consideration of a negotiable promissory note in the hands of a innocent holder for value could not be inquired into, and before the consideration could be im-

peached it was necessary to show that the holder had notice of the lack of consideration.

It is conceded that in the United States the decisions of the courts have varied. Formerly a good many of the courts followed the principle established in *Gill* v. *Cubitt*, and a few of them still adhere to the rule therein declared, but by far the greater number now concur in the doctrine which has been firmly settled in England and the Supreme Court of the United States, and in the courts of all the leading commercial states of the Union: Redf. & Big. Lead. Cas. 257; 1 Daniell Nego. Instr., § 775.

The rule that a purchaser is not an innocent holder if there are circumstances connected with the transfer sufficient to put an ordinarily prudent man on inquiry is uncertain and devoid of uniformity. Suspicions assert themselves in different ways in different minds. In like manner what is to be deemed prudence will be found to vary with different persons. One innocent holder may be more or less suspicious under similar circumstances at one time than another. So, too, one prudent man may also suspect when another would not, and the standard of the jury may be higher or lower than that of other men equally prudent in the management of their affairs.

In any view, therefore, both upon principle and authority, and from the experience of jurists and commercial men, and the interests of the affairs of business life, it is safe to say that the liberal doctrine which promotes the free circulation of negotiable instruments is the best, and that the good faith of the transaction should be the decisive test of the holder's rights. It follows that the court's instruction upon the question of notice was wrong.

The next question is as to the burden of proof in case it was found that the note had its inception in fraud. In the last edition of Story on Promissory Notes it is laid down that if the maker proves that the note had been obtained from him by fraud or was fraudulently put in circulation by the payee, the holder must prove that he took it honestly without knowledge of the fraud, and it may then be incumbent on him to show that he has given value for it (Story Prom. Notes, 6th ed., § 196). The rule is stated very distinctly and clearly by Greenleaf (2 Greenl. Ev., § 172), where he says: "Even in an action by the endorsee against an original party to a bill, if it be shown on the part of the defendant that the bill was made under duress, or that he was defrauded of it, or

if a strong suspicion of fraud be raised, the plaintiff will then be required to show under what circumstances, and for what value, he became the holder. It is, however, only in such cases that this will be demanded of the holder; it will not be required where the defendant shows nothing more than a mere want of consideration on his part."

For the propositions above stated, the learned authors cite many cases. In *Bailey* v. *Bidwell*, 13 M. & W. 73, Baron PARKE says: "It certainly has been, since the later cases, the universal understanding that if the note were proved to have been obtained by fraud or affected by illegality, that afforded a presumption that the person who had been guilty of the illegality would dispose of it, and would place it in the hands of another person to sue upon it; and that such proof casts upon him, plaintiff, the burden of showing that he was a *bonâ fide* holder for value." In *Smith* v. *Brain*, 16 Q. B. 244, the case of *Bailey* v. *Bidwell* was commented on and approved, and Lord CAMPBELL, C. J., said that since the new rules, judges have with entire approbation directed juries that when the bill was illegal in its inception, or when the immediate endorser to the plaintiff obtained possession of it by fraud, the want of consideration as between him and the plaintiff may be presumed, and in such case the onus is cast upon the plaintiff of proving that he gave value. In the subsequent case of *Harvey* v. *Towers*, in the Court of Exchequer, 6 Exch. 656, the same rule was enforced, PLATT, B., observing that the cases of *Bailey* v. *Bidwell*, and *Smith* v. *Brain*, were the decisions of eight judges, and that the casting the burden of proving consideration on the holder of a bill shown to be effected by fraud, was an extremely just rule, as he must best know what consideration he gave for it. In *Hall* v. *Featherstone*, 3 H. & N. 284, POLLOCK, C. B., says: "If there are any circumstances in the nature of fraud or illegality which can be left to the jury, proof of these circumstances will cast on the plaintiff the onus of showing that he gave value for the bill." And BRAMWELL, B., said: "The cases have established that if there be fraud or illegality in the inception of a bill, or in the circumstances under which it was taken by the person who endorsed it to plaintiff, he must prove consideration. That is established beyond controversy."

The same doctrine has received the unqualified assent and approbation of the Supreme Court of the United States.

In the case of *Smith* v. *Lac County*, 11 Wall. 139, it is expressly decided that in a suit on a negotiable security, when the defendant has shown strong circumstances of fraud in the origin of the instrument, this casts upon the holder the necessity of showing that he gave value for it before maturity. In Ohio (*McKisson* v. *Stanberry*, 3 Ohio St. 156), the rule is stated to be that, where it is shown that the transaction on the part of the original holder was a positive fraud, then it devolves on the party claiming under such transaction to show that he acted honestly without a knowledge of the fraud. SAVAGE, C. J., in *Vallett* v. *Parker*, 6 Wend. 615, says: "The holder of a note or bill need not, in the first instance, show a consideration—possession proves property; but if there are any suspicious circumstances as to the *bona fides* of his possession, and the defendant has a good defence against the payee, then he must show that he paid value for it. For instance, if the note has been lost or stolen, or fraudulently put into circulation, &c., then the plaintiff must show that he came lawfully and fairly by it, and paid value for it." In *Monroe* v. *Cooper*, 5 Peck 412, the court declares: "We agree that a new trial in this case must be granted, for the purpose of allowing the defendants to prove, if they can, that there was fraud practised in the inception of the note, or that it was fraudulently put in circulation. This fact being established will throw upon the plaintiff the burden of proof to show that he came by the possession of the note fairly and without any knowledge of the fraud;" and in *Holme* v. *Karsper*, 5 Binn. 469, the court said: "In the first instance it is presumed that every man acts fairly. It lies on the defendant, therefore, to show some probable ground of suspicion before the plaintiff is expected to do anything more than produce the note on which he founds his action. But this being done, it is reasonable that the holder should be called upon to rebut the suspicion. All that is asked of him is to show that he has acted fairly and paid value."

The latest elementary writer on this subject thus sums up the rule as the settled law: "There may be at this juncture a shifting of the burden of proof from the defendant to the plaintiff, for the principle is well established that if the maker or acceptor, who is primarily liable for payment of the instrument, or any party bound by the original consideration, proves that there was fraud or illegality in the inception of the instrument; or if the circumstances raise a strong suspicion of fraud or illegality, the owner must then

respond by showing that he acquired it *bonâ fide* for value, in the usual course of business while current, and under circumstances which create no presumption that he knew the facts which impeach its validity. This principle is obviously salutary, for the presumption is natural that an instrument so issued would be quickly transferred to another, and unless he gave value which could be easily proved, if given, it would perpetuate great injustice and reward fraud to permit him to recover:" 1 Daniell Nego. Instr., § 815.

The reasoning by which the foregoing rule is supported is, I think, unanswerable, and commends itself for its manifest justice. Where an instrument is procured by fraud, or is affected with illegality, the payee would undoubtedly be eager to transfer it, so that suit would be brought in the name of another, in order to prevent any valid defence if possible.

In such a case it is justice to the defendant, and it is no hardship to the plaintiff, to require him to show that in acquiring the note he acted honestly and in good faith, and that he gave value for it. On this point, therefore, in giving the third instruction for the defendant, I think the court decided rightly. There are no other questions in the record requiring attention, or to which any objection is perceived. For the giving of the fourth, fifth and sixth instructions, on behalf of the defendants, in regard to the question of diligence and notice by the plaintiff, I think the judgment should be reversed and the cause remanded.

The decisions of the Supreme Court of Missouri in regard to negotiable paper have recently been very conflicting. In *Washington Savings Bank* v. *Ekey*, 12 Amer. Law Reg. 625, s. c. 51 Mo. 272, this court held that the alteration of a negotiable promissory note after its execution, by filling blanks in a printed form, so as to make the note draw interest at a given rate from date, avoids the note in the hands of an innocent holder for value, who has received the same before maturity in good faith and for value. In *Hamilton* v. *Marks*, 52 Mo. 78, it was held that a negotiable promissory note, transferred before maturity, under circumstances which would cast a shade upon the transaction and put the holder on inquiry in regard to equities existing between the original parties, is held subject to such equities.

Both of these decisions materially embarrassed and endangered the free and safe circulation of commercial paper, and have been highly unsatisfactory to the bar, as well as the business community. The first one has been very recently substantially overruled: *Capital Bank* v. *Armstrong*, 62 Mo. 59, and *Iron Mountain Bank, &c.*, v. *Murdock and Armstrong*, 15 Amer. Law Reg. N. S. 733; and now, by the above reported case, the doctrine of the last is entirely swept away. H. B. JOHNSON.